

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DARRIN PLANK</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 237,741
<b>LOWES COMPANIES, INC.,</b>	)	
Respondent	)	
AND	)	
	)	
<b>RELIANCE NATIONAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals Administrative Law Judge Brad E. Avery's October 16, 2000, Award. On April 25, 2001, the Appeals Board heard oral argument in Topeka, Kansas.

**APPEARANCES**

Beth Regier Foerster of Topeka, Kansas, appeared on behalf of the claimant. Michael T. Halloran of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and has adopted the stipulations listed in the Award. In addition, the parties stipulated, at oral argument before the Appeals Board, that the record should also contain the September 19, 2000, deposition testimony of John D. Ebeling, M.D.

**ISSUES**

This is a claim for an August 20 1998, work-related accident that resulted in a permanent injury to claimant's neck. Respondent provided claimant with medical treatment for his neck injury which included surgery. After claimant recovered from the surgery, he returned to his regular job at the same wage. Thus, work disability is not an issue.

Respondent, however, appeals the Administrative Law Judge's (ALJ) 15 percent permanent partial general disability award based on permanent functional impairment. First, respondent argues, claimant failed to prove he suffered an accidental injury arising

out of and in the course of his employment. Respondent contends the better explanation for claimant's neck injury is that it was caused not by his work but by claimant participating in personal weight lifting activities. Even if the Appeals Board (Board) finds claimant injured his neck at work, then the respondent argues that claimant's permanent partial general disability award should be based on claimant's treating physician, Dr. John D. Ebeling's, permanent functional impairment opinion of 12 percent instead of the 15 percent awarded by the ALJ.

Conversely, claimant requests the Board to affirm the Award. Claimant contends he proved through his testimony that he injured his neck while performing his regular heavy work activities for respondent. Additionally, claimant argues the more accurate and more persuasive permanent functional impairment rating is Dr. Prostic's 15 percent as awarded by the ALJ.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions:

The Board affirms the ALJ's finding that claimant injured his neck while working for the respondent on August 20 1998, and as a result of that injury he sustained a 15 percent permanent functional impairment. The Board finds the ALJ's Award sets out findings of fact and conclusions of law that are accurate and supported by the record in regard to those issues. It is not necessary to repeat those findings and conclusions in this Order. Thus, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth in this Order.

In particular, the Board finds, as the ALJ had to find, that claimant's testimony is credible and persuasive that he injured his neck while delivering heavy appliances and lumber for the respondent on August 20, 1998. Although claimant on a regular basis participated in weight lifting activities away from work, he unequivocally denied injuring his neck while lifting weights.

Respondent argues that claimant told a fellow employee that he had injured his neck not at work but while lifting weights. The Board concludes that the fellow employee, Sean Harvey, testified that claimant did tell him he hurt his neck lifting weights, but he also testified that he did not know whether claimant was referring to his weight lifting activities away from work or lifting the heavy merchandise at work.

Futhermore, Dr. Prostic determined claimant's 15 percent permanent functional impairment by utilizing the Injury Model the preferred method for determining spinal impairments as contained in the statutorily required AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.<sup>1</sup> While Dr. Ebeling testified he consulted the AMA Guides, Fourth Edition to arrive at his 12 percent permanent functional impairment rating, he was unable to specifically identify how he arrived at the 12 percent rating utilizing the AMA Guides, Fourth Edition.

The ALJ found claimant's average weekly wage was \$303.56. But the parties, at oral argument before the Board, stipulated that claimant's average weekly wage was \$333.00 instead of \$303.56. Thus, the calculation of the Award will be modified to reflect this increase in the claimant's average weekly wage.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Board that ALJ Brad E. Avery's October 16, 2000, Award should be affirmed, except the Award should be computed based on a stipulated average weekly wage of \$333.00 instead of the \$303.56 as found by the Administrative Law Judge.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Darrin Plank and against the respondent, Lowes Companies, Inc., and its insurance carrier, Reliance National Insurance Company, for an accidental injury which occurred on August 20, 1998, and based upon an average weekly wage of \$333.00.

Claimant is entitled to 10.57 weeks of temporary total disability compensation at the rate of \$222.01 per week or \$2,346.65, followed by 62.25 weeks of permanent partial general disability compensation at the rate of \$222.01 or \$13,820.12, for a 15 percent permanent partial general disability, making a total award of \$16,166.77, which is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

Respondent is ordered to pay all reasonable and related medical expenses.

Claimant is entitled to an unauthorized medical allowance in the statutory maximum of \$500.

Claimant is entitled to future medical treatment upon proper application and approval by the Director.

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<sup>1</sup> See K.S.A. 1998 Supp. 44-510e(a)(2)

Claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

All remaining orders contained in the Award are adopted by the Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Beth R. Foerster, Topeka, Kansas  
Michael T. Halloran, Overland Park, Kansas  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director